HJ. MAHMUD & PARTNERS

v.

GOON SWEE HEANG & ORS.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[ORIGINATING SUMMONS NO. 24-93-90]
4 OCTOBER 1990

CIVIL PROCEDURE: *Plaintiff solicitors holding proceeds of sale of land - Dispute as to share of each of 4 defendants - Originating summons as interpleader - Issue to be tried - Meaning of "collusion" - Order 17 r. 3(a)(b), (c) Rules of the High Court 1980.*

The 4 defendants were registered proprietors of the said land and charged it to a bank to secure overdraft facilities to the extent of RM250,000 for KK; the 1st, 2nd and 3rd defendants (D1, D2 and D3) were among the four partners of the firm. The said land was sold and the plaintiffs HM acted as solicitors for the 3rd defendant; HM held RM1.4 mil being the balance of the sale price after necessary deductions. D1 wanted this amount to be divided equally among the 4 defendants; the other 3 defendants however were of the view that since D4 was not a partner in KK he should not be involved in the payment of the redemption sum of RM250,000 to the bank; as such D1, D2 and D3's share of the redemption sum was approximately RM83,000 each.

HM decided to retain RM62,500 this being 1/4 share of the redemption sum pending the decision as to whether the sale proceeds were to be divided equally among the four defendants. Pursuant to a letter from D4's solicitors HM released a certain sum of the RM62,500 and kept the remainder (which is the subject of this dispute) in a fixed deposit. Both D1 and D4 claim this amount.

HM filed an originating summons in regard to an interpleader matter under O. 17 of the Rules of the High Court 1980 (RHC), seeking a declaration as to who is entitled to the remainder monies. D4 contends that this application is misconceived as there is no adverse claim by D1 to the monies and that HM have colluded with D1. The issue for determination is whether or not there was an agreement amongst the 4 defendants prior to the sale of the property that D4 would not be liable to bear any part of the redemption sum.

Held:

[1] On the facts of this case

(a) The requirements of rr. 3(3)(a)(b) and (c) and 5(1)(b) of RHC 1980 have been satisfied.

(b) In the context of O. 17 r. 3(3)(b) collusion does not necessarily entail anything morally wrong but means "playing the same game" as one of the claimants; the person who interpleads must be neutral in the dispute between the claimants. This allegation by D4, of HM's collusion is not supported by the evidence.

(c) Since D4 is alleging there was such an agreement the Court makes him the plaintiff and D1 the defendant for the purposes of the determination.

[2] Since D2 and D3 have no adverse claims to the subject matter they have been improperly joined as defendants in this application; they are therefore entitled to costs by HM.

[Order for trial between HM, D1 and D4. Disputed amount to be held in fixed deposit until determination of the dispute.]

Cases referred to:
Murietta v. South American Co. [1893] 62 LJQB 396
Tucker v. Morris [1882] 1 C & M 73
Cockrane v. O'Brien [1845] & Jo & Lat 380

Legislation referred to:
Rules of the High Court 1980, O. 17, r. 5(1)(b), r. 3(3)(a), r. 3(3)(c)

For the plaintiffs - Haji Mahmud; M/s. Haji Mahmud & Partners
For the 1st defendant - Chong Woon Khoon; M/s. Chong Woon Khoon
For the 2nd, 3rd and 4th defendants - Chooi & K.S. Lee; M/s. Chooi Shee Hoong & Gan

JUDGMENT

KC Vohrah J:

This originating summons is in regard to an interpleader matter under O. 17 of the Rules of the High Court. The plaintiffs acted as solicitors for the 4 defendants in the sale of their land. The plaintiffs are holding a sum of RM20,833.44 out of the proceeds of the sale of the land. They say they do not know to whom they should pay the sum to, whether to the 1st defendant or the 4th defendant. At the hearing of the summons, under r. 5, the 4th defendant contended that the application for interpleader relief is misconceived in that in reality there is no adverse claim by the 1st defendant and that the plaintiffs have colluded with the 1st defendant. I do not agree. My view is that there is an issue to be determined under r. 5(1)(b).

The application of the plaintiff is supported by affidavits of the solicitor who handled the sale transaction and I am satisfied that the evidence shows that the plaintiffs claim no interest in the subject matter other than for charges or costs. This is a requirement under r. 3(3)(a). I am also satisfied that the evidence shows that they are willing to transfer the subject matter, the sum of RM20,833.44, into Court or to dispose of it as the Court may direct. This satisfies the requirement under r. 3(3)(c).

There is a further requirement under r. 3(3)(b) that there be evidence that the plaintiffs do not collude with any of the claimants, the defendants. The 4th defendant says there is collusion between the plaintiffs and the 1st defendant. To my mind the evidence in the affidavits supporting the application for interpleader relief shows that there is no such collusion.

Collusion in the context of r. 3(3)(b) does not necessarily entail anything morally wrong but means "playing the same game" as one of the claimants (*Murietta v. South American Co.* [1893] 62 LJQB 396; *Tucker v. Morris* [1882] 1 C & M 73). In other words to satisfy the requirement under r. 3(3)(b) the person who interpleads must be neutral in the dispute between the claimants. The allegation of the 4th defendant of collusion on the part of "the plaintiff" with the 1st defendant comprises nothing more than mere suspicions without any basis for those suspicious. There is not an iota of evidence from the affidavits where it can be inferred that the plaintiffs are playing on the same side as the 1st defendant and are not neutral in the dispute.

I now come to the contention of the 4th defendant that the 1st defendant has no adverse claim to the sum of money. The 4 defendants were registered proprietors (in the proportion of 10/46, 10/46, 10/46 and 16/46 in respect of the 1st, 2nd, 3rd and 4th defendants respectively) of a piece of land and they charged the land to a bank to secure overdraft facilities to the extent of RM250,000 for a business firm called Khoon Kee. The firm had four partners, the 1st, 2nd and 3rd defendants and another person; but the 4th defendant was not a partner.

The land that was charged to the bank was eventually sold and the plaintiffs who acted as solicitors for the 4 defendants had in their possession the sum of RM1,460,182.40 this being the balance of the sale price after deduction of whatever was paid to the bank in respect of what was owed on the charges. The redemption amount was RM252,801.28 but RM250,000 out of the sale proceeds together with RM2,801.28 advanced by the 2nd defendant were paid to the bank in respect of the charge.

The plaintiffs requested the 4 defendants to collect their share of the sum of RM1,460,182.40. The 1st defendant wanted this sum to be divided equally among the 4 defendants. The other 3 defendants were, however, of the view that account had to be taken that the sum of RM250,000 paid to the bank (the "redemption sum") on the charge did not involve the 4th defendant as he was not a partner in the firm of Khoon Kee in whose favour the bank extended overdraft facilities on the basis of the charge on the land; in other words, in their view, only 1st, 2nd and 3rd defendant were involved in the payment of the redemption sum and this came to RM83,833.33 for each of them. The plaintiffs, however, decided to retain RM62,500 this being 1/4 share of the redemption sum of RM250,000 pending the settlement of the dispute whether the sale proceeds were to be divided equally among the 4 defendants. Later, after a letter from the 4th defendant's solicitor, the plaintiffs released the sum of RM41,666.66 to the 4th defendant and retained the sum of RM20,833.34. Both 1st and 4th defendants claim this amount. The plaintiffs have placed this sum on a fixed deposit with a bank pending a resolution as to whether this sum belongs to the 1st or 4th defendant.

The fourth defendant in para. II of his affidavit has averred that "all the defendants had verbally agreed prior to the sale of the said property, that I should not be liable to be bear any part of the said redemption sum whatsoever towards redeeming the said property ...." This has been categorically denied by the 1st defendant in para. 3.5 of her affidavit. A mere pretext of a conflicting claim is not sufficient; the Court must be satisfied that there is a question to be tried (*Cockrane v. O'Brien* [1845] & Jo & Lat 380 at p. 389). In this matter, however, clearly the contention of the 4th defendant that the plaintiffs should not have taken out the interpleader summons on the ground the 1st defendant has no adverse claim cannot hold water. The issue to be tried is whether or not there was an agreement amongst the four defendants prior to the sale of the property that the 4th defendant would not be liable to bear any part of the redemption sum payable to the bank in respect of the charge over the land. Since the 4th defendant is alleging that there was such an agreement I make him the plaintiff for the determination of the issue and the 1st defendant the defendant for the purposes of the determination.

In the meantime the disputed amount which is being kept on a fixed deposit with a bank shall remain with the bank until the determination of the issue at the trial of the interpleader.

I order that the trial be held on a date convenient to the 1st and 4th defendants and the Court.

One other matter. The 2nd and 3rd defendants have no adverse claims to the subject matter and have been improperly joined as defendants in this application. They are entitled to costs incurred by the misjoinder which are to be paid by the plaintiffs.

Also found at [1990] 2 CLJ 991